

10-8-2008

State v. Nevarez Respondent's Brief Dckt. 34692

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,

Plaintiff-Respondent,

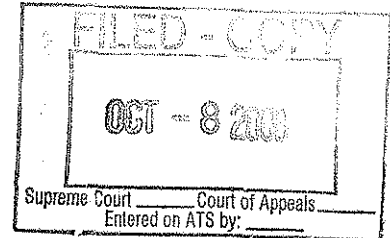
vs.

RAMIRO R. NAVAREZ,

Defendant-Appellant.

NO. 34692

BRIEF OF RESPONDENT



**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF MINIDOKA**

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Ramiro R. Navarez appeals from the judgment entered upon his conditional guilty plea to robbery. On appeal, he challenges the denial of his motion to suppress and the denial of his motion for funds to retain an expert.

Statement of Facts and Course of Proceedings

At approximately 1:00 a.m. on October 27, 2006, two men robbed the Maverick store located on Scott Avenue in Rupert. (4/16/07 Tr., p. 26, Ls. 6-7, 22-23.) An "all call" went out to law enforcement. (4/16/07 Tr., p. 26, L. 19.) The dispatcher advised that there were two suspects, one of whom had a weapon; that they were wearing hooded sweatshirts, stocking caps, and bandannas; and that they left the store on foot. (4/16/07 Tr., p. 27, Ls. 19-24.) Sheriff's Deputy Joe Moore heard the "all call" and began driving toward Rupert from Paul. (4/16/07 Tr., p. 29, L. 14.)

On the drive from Paul to Rupert, Deputy Moore observed two or three cars traveling in the opposite direction, but the occupants did not match the description of the robbers supplied by dispatch. (4/16/07 Tr., p. 30, Ls. 8-9, 12.)

As Deputy Moore approached the Stimpy's convenience store (4/16/07 Tr., p. 30, Ls. 22-25, p.31, Ls. 1-2), he could see another car approaching from the opposite direction, so he slowed down in order to make use of the well-lit area (4/16/07 Tr., p. 34, Ls. 10-13). On approach, the other car was only traveling 42 mph in a 55 mph zone. (4/16/07 Tr., p. 31, Ls. 5-6; p. 34, Ls. 7-8.) Deputy Moore testified that, using the light from Stimpy's to get a better look, he

observed that the car was occupied by four Hispanic males, all with shaved heads, and sitting in the "low rider" position. (4/16/07 Tr., p. 34, Ls. 10-13; p. 35, Ls. 2-7; p. 37, Ls. 4-6; p. 47, Ls. 5-8.) Officer Moore further testified that he continued to observe the vehicle in his rear view mirror after the two cars passed. (4/16/07 Tr., p. 36, Ls. 14-24; p. 37, Ls. 14-17; p. 38, Ls. 14-19.) The occupants appeared to act suspiciously to Deputy Moore because they were making "furtive movements," and he could see that all four occupants turned to look at him. (4/16/07 Tr., p. 36, Ls. 16-17; p. 37, Ls. 14-17; p. 38, Ls. 14-22; p. 43, Ls. 20-25.)

Moore turned around and followed the vehicle back toward Paul. (4/16/07 Tr., p. 38, L. 25 – p.31, L.1.) Moore observed that the vehicle was being driven carefully at a speed below the limit; that the car's occupants appeared to be making "furtive movements" and appeared to be nervous; that the driver always used his turn signal when changing lanes or turning corners; and that often the signal was turned on well in advance of the lane change or turn, all of which Moore interpreted as an exaggerated effort to obey all traffic rules and avoid suspicion, but which only served to increase the officer's suspicion. (4/16/07 Tr., p. 31, Ls. 5-11, 21-25; p. 32, Ls. 14-20; p. 42, Ls. 9-18; p. 43, Ls. 20-25; p. 45, Ls. 7-11, 19-25; p. 46, Ls. 1-4.)

Moore pulled the car over after following it to Paul because, based on his training and experience, the behavior of the driver and other occupants was suspicious. (4/16/07 Tr., p. 43, Ls. 2-8, 16-25.) Deputy Moore also recalled being told by dispatch that the suspects were Hispanic (4/16/07 Tr., p. 28, Ls. 2-22), and he believed that he observed that the occupants of the car were Hispanic

(4/16/07 Tr., p. 43, Ls. 23-25). In addition, the car was traveling within a reasonable proximity to the time and place of the robbery. (4/16/07 Tr., p. 79, Ls. 3-6.) Moore stated that when he approached the car, the driver (Navarez) appeared calm, but the three passengers were acting nervous. (R., p. 26, para 15.) Moore saw that two of the occupants matched the description of the robbers, and that there were hooded sweatshirts, stocking caps, and bandannas in plain view in the car. (R., p. 26, paras 13-14.) Moore detained all four occupants of the vehicle and seized the vehicle as evidence. (R., p. 27, para 23.)

The State charged Navarez with robbery and sentencing enhancements for using a gun in the commission of a crime and for criminal activity associated with any gang or gang member (R., pp. 61-67, 72-74). Navarez moved to suppress evidence obtained from the traffic stop. (R., pp. 70-71.) He also made a motion for funds to hire an expert to rebut Deputy Moore's anticipated testimony as to the visual observations he made before stopping Navarez's car. (R., pp. 104-05.) The district court denied both motions. (R., pp. 131-38, 141-42.)

Navarez entered a conditional guilty plea and reserved the right to appeal the denial of his suppression motion and motion for expert funds. (R., pp. 171-76.) The sentencing enhancement charges were dismissed. The court accepted Navarez's guilty plea (R., p. 172), and imposed a unified sentence of 25 years, with seven years fixed, followed by 18 years indeterminate, and retained jurisdiction (R., pp. 188-95).

Navarez filed a timely notice of appeal from the judgment. (R., pp. 198-99.)

ISSUES

Navarez states the issues on appeal as follows:

1. Was it fundamentally unfair and thus a violation of Mr. Navarez's constitutional and statutory rights for the district court to deprive him of the expert services required to present an adequate defense?
2. Was there a reasonable and articulable suspicion that the occupants of the car were the robbers of the store when they did not match the description other than by their ethnicity?

(Appellant's brief, p. 4.)

The State rephrases the issues on appeal as follows:

1. Has Navarez failed to show error in the denial of his motion to suppress?
2. Has Navarez failed to show that he was deprived of his constitutional and statutory rights when the district court denied him funds for certain expert services?

ARGUMENT

I.

Navarez Has Failed To Show Error In The Denial Of His Motion To Suppress

A. Introduction

Navarez challenges the denial of his motion to suppress arguing, as he did below, that Deputy Moore did not have a reasonable and articulable suspicion to stop Navarez's vehicle. (Appellant's brief, pp. 13-14.) Application of the law to the facts supports the district court's order denying Navarez's motion to suppress.

B. Standard Of Review

On appeal from the district court's denial of the motion to suppress, a bifurcated standard is applied. State v. Butcher, 137 Idaho 125, 129, 44 P.3d 1180, 1184 (Ct. App. 2002), rev. denied (2002) (citing State v. Abeyta, 131 Idaho 704, 708, 963 P.2d 387, 391 (Ct. App. 1998)). The appellate court defers to the lower court's findings of fact that are supported by substantial and competent evidence in the record, and freely reviews the application of constitutional principles to the facts as found. Id. The determination of whether a search is reasonable under the Fourth Amendment is a question of law over which the appellate court exercises free review. Butcher, 137 Idaho at 129, 44 P.3d at 1184 (citing State v. McIntee, 124 Idaho 803, 804, 864 P.2d 641, 642 (Ct. App. 1993)).

C. The District Court Correctly Concluded, Based On The Totality Of The Circumstances, That The Traffic Stop Was Supported By Reasonable Articulate Suspicion

A warrantless search or seizure is presumptively unreasonable unless it falls within certain special and well-delineated exceptions to the warrant requirement. State v. Butcher, 137 Idaho 125, 129, 44 P.3d 1180, 1184 (Ct. App. 2002) (citations omitted). A warrantless stop is justified if there is a reasonable and articulable suspicion that an individual either has or is going to commit a crime. Terry v. Ohio, 392 U.S. 1, 30 (1968). A traffic stop is considered to be a seizure. State v. Gutierrez, 137 Idaho 647, 650, 51 P.3d 461, 464 (Ct. App. 2002). The district court correctly concluded that the stop in this case was constitutionally reasonable because, by the time Deputy Moore followed it back to Paul, he had developed, based on all of the circumstances, a reasonable and articulable suspicion that the individuals in the car might have committed the armed robbery of the Maverick station. State v. Butcher, 137 Idaho 125, 129, 44 P.3d 1180, 1184 (Ct. App. 1992) (citing Terry v. Ohio, 392 U.S. 1 (1968), and Florida v. Royer, 460 U.S. 491 (1983)).

In another case also involving a warrantless stop, State v. Butcher, 137 Idaho 125, 44 P.3d 1180 (Ct. App. 2002), the defendant was convicted of first degree murder, and appealed the district court's pretrial ruling denying his motion to suppress. At 4:00 a.m., Butcher and another man had broken into the home of Blake Morgan and shot three rounds into his head and neck. Butcher, 137 Idaho at 128, 44 P.2d at 1183. The two men fled in a grey two-toned van, as observed by a neighbor drawn to his window by the sound of gunshots. Id.

A few days later, a Twin Falls police officer stopped a van matching the description of the vehicle used in an immediately preceding armed robbery (and the murder). Butcher, 137 Idaho at 129-30, 44 P.3d at 1184-85. The officer saw firearms in plain view in the van, including a nine-millimeter pistol. Id. This led to the detention and arrest of Butcher and his co-defendant because they were perceived to be dangerous and there was reasonable suspicion to believe that they had been involved in the robbery.

Butcher made a pretrial motion to suppress the evidence that resulted from the stop, namely the weapons and especially the pistol. The court held that the officer was justified in conducting a Terry stop because the officer had a reasonable suspicion that a serious felony had been committed by the occupants of the van based on information he was provided, the officer observed that the two persons in the van matched the description given to him, and the van was the only vehicle in the vicinity at 1:47 a.m. Butcher, 137 Idaho at 130, 44 P.3d at 1185.

Similarly here, Deputy Moore developed a reasonable articulable suspicion to make the stop because the dispatcher indicated that the victim of the robbery reported that it was committed by two Hispanic males, and Deputy Moore observed what he thought to be Hispanic males in the car he followed. He also knew that the robbery had occurred around 1:00 a.m. and that, coming from a small town like Rupert with only a few exits, it would be reasonable to expect that the robbers might be traveling out of Rupert on the road that leads to Paul at that time of night. (4/16/07 Tr., p. 44, Ls. 18-21; p.47, Ls. 16-25; p. 59,

Ls. 16-25.) Deputy Moore also testified that included in his reasons for stopping the car was that the people inside the vehicle showed a "keen" interest in him as an officer and, further, that "there was furtive movement inside the vehicle once they had seen it was a police officer's vehicle. . . ." (4/16/07 Tr., p. 43, Ls. 16-24.) Based on the totality of these factors, the district court was correct in concluding that the motion to suppress should be denied because these facts and observations by Deputy Moore gave rise to a reasonable, articulable suspicion.

In a case relied upon by the district court in this case, State v. Gascon, 119 Idaho 932, 812 P.2d 239 (1991), the court found that, based on a brief description of a robber, the police were justified in setting up a roadblock and observing passing motorists, looking for one that matched the suspect's description. When Gascon's car passed through the roadblock, the police thought the driver was acting suspiciously and the car was stopped. Under the seat, the police saw a baseball cap protruding. Upon removing the hat, the officer found a jacket, notes, and a bag of money. Gascon was charged with robbery and his motion to suppress the evidence found in the car was denied. The appellate court affirmed the denial of the motion to suppress.

The Navarez's argument that Deputy Moore somehow did not have a reasonable articulable suspicion is not supported by the record. (Appellant's Brief, p. 12; 4/16/07 Tr., p. 43, Ls. 16-25.) Deputy Moore testified that his suspicion was aroused because the people in the car showed an interest in him as an officer; there was "furtive movement" in the car; and the occupants

appeared to be Hispanic, as described in the “all call.” Interestingly enough, Navarez also cited State v. Butcher, supra (citing Gascon, supra), but he does not distinguish the circumstances that exist here from the circumstances in Butcher, where the court approved the traffic stop and detention. Butcher is a case that, factually, parallels the instant case on the issues of the stop and search. The outcome in Butcher, where the trial court denied the defendant’s motion to suppress based on similar circumstances as in this case, does not support Navarez’s arguments, especially where Navarez does not make a distinction between the instant case and the rulings in Butcher and Gascon, supra.

The district court correctly applied the law to the facts in concluding that Deputy Moore, having observed four persons matching the general description of the suspects in the car at that late hour and in that vicinity, he was justified in conducting a Terry stop and detaining the occupants. State v. Butcher, 137 Idaho 125, 44 P.3d 1180, 1185 (Ct. App. 2002). Navarez has failed to show any basis for reversal of the denial of his motion to suppress.

II.

Navarez Failed To Show That He Was Deprived Of His Constitutional Rights In The Denial Of Funds To Hire An Expert

A. Introduction

Navarez requested funds to hire a spatial and visual expert. Navarez anticipated that the expert’s testimony would refute Deputy Moore’s testimony about what Moore was able to observe in the dark on the evening of the robbery

relative to Navarez's car and its occupants. The district court denied Navarez's motion, ruling that the expert's testimony would not assist the trier of fact.

Navarez challenges the denial of his motion for funds to hire an expert witness at state expense arguing, as he did below, that the district court denied him "fundamental fairness as embodied in the Due Process and Equal Protection clauses of the Fourteenth Amendment, as well as his right to present evidence pursuant to the Sixth Amendment." (Appellant's brief, p. 4.) Navarez has failed to show either an abuse of discretion or a violation of his constitutional rights.

B. Standard Of Review

Before authorizing the expenditure of public funds in an indigent's defense, the trial court must determine whether the funds are necessary in the interest of justice. State v. Olin, 103 Idaho 391, 396, 648 P.2d 203, 207 (1982) (citing State v. Powers, 96 Idaho 833, 838, 537 P.2d 1369, 1374 (1975)). This determination is within the discretion of the trial court, and a denial of a request for investigative services will not be disturbed absent a showing that the trial court abused its discretion. An abuse of discretion would occur if the court rendered a decision which is clearly erroneous and unsupported by the circumstances. State v. Olin, 103 Idaho 391, 396, 648 P.2d 203, 207 (1982).

C. Application Of The Law To The Facts Shows That Navarez Was Not Deprived Of His Constitutional Rights In The Denial Of Funds To Hire An Expert

Navarez requested funds to hire an expert pursuant to Idaho Code Section 19-852(a)(2), to retain the services of Marc Green, PhD. (R., pp. 104-16.) Dr. Green's expertise is as a spatial and visual expert and Navarez wanted

to hire him to challenge the observations made by Deputy Moore under the conditions that existed the night of the traffic stop. Navarez contended that Deputy Moore's observations were "highly suspect" and that Dr. Green would testify about what in fact could have been and what was or was not observed by Deputy Moore. (3/9/07 Tr., p. 6, L. 17 – p. 8, L. 11.) However, the district court questioned whether Dr. Green's testimony would assist the trier of fact. The prosecutor stated that, "I don't believe that this expert's testimony will in any way assist the trier of fact in determining what's relevant as to a reasonable suspicion in this case." (3/9/07 Tr. p. 11, Ls. 20-23.) The district court agreed, ruling:

The accuracy of the deputy's statements about what he observed at night while the vehicles were passing each other and then through his rearview mirror after the vehicles had passed can, if necessary to decide this case, be determined by the court without the assistance of an expert witness. It is the fact finder's function to judge the credibility of witnesses. (citations omitted) The court finds that the denial of the services of an expert witness at this stage of the proceedings will not deny the defendant of the fundamental fairness required by the due process clause. Therefore, an expenditure of funds for that purpose is not necessary in the interest of justice.

(R., p. 137.) Contrary to Navarez's assertions on appeal, the district court acted well within its discretion in denying Navarez's motion.

The Constitution does not require a state to provide expert or investigative assistance merely because a defendant requests it. State v. Lovelace, 140 Idaho 53, 65, 909 P.3d 278, 290 (2003), (citing State v. Olin, 103 Idaho 391, 648 P.2d 203 (1982)) (additional citations omitted). A defendant's request for expert or investigative services should be reviewed in light of all circumstances and

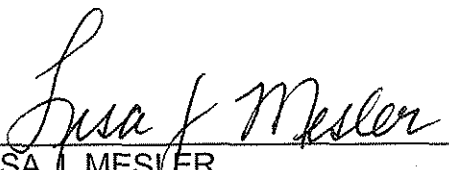
measured against the standard of "fundamental fairness" embodied in the due process clause. Lovelace, 140 Idaho at 65, 278 P.3d at 290 (citations omitted).

It is clear from the record that, in ruling on Navarez's motion for funds to retain an expert, the district court took into account the fundamental fairness required by the due process clause, and the circumstances of the case. The Court concluded that the expert requested by Navarez would not aid the court as the trier of fact, but rather it was a matter of weighing Deputy Moore's testimony as the trier of fact. Navarez failed to establish an abuse of discretion in the district court's ruling and, as such, the ruling should not be disturbed.

CONCLUSION

The State respectfully requests that this Court affirm the judgment entered upon Navarez's guilty plea to robbery.

Dated this 8th day of October 2008.

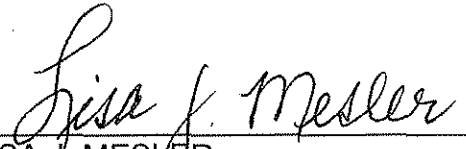


LISA J. MESLER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of October 2008, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

JEFF BROWNSON
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